

The Hon. Benjamin H. Settle

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA, a foreign insurance  
company; THE PHOENIX INSURANCE  
COMPANY, a foreign insurance company,

Plaintiff,

v.

NORTHWEST PIPE COMPANY, a Washington  
corporation; and GREATER VANCOUVER  
WATER DISTRICT, a British Columbian statutory  
corporation,

Defendant

NORTHWEST PIPE COMPANY, a Washington  
corporation

Counterclaim Plaintiff,

v.

TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA, a foreign insurance  
company; THE PHOENIX INSURANCE  
COMPANY, a foreign insurance company,

Counterclaim Defendant.

No. 3:17-cv-05098-BHS

**COUNTERCLAIM  
DEFENDANT'S TRIAL BRIEF**

1 Defendants Travelers Property Casualty Company of America and the Phoenix  
2 Insurance Company (hereinafter “Travelers”) present the following Trial Brief.

### 3 I. INTRODUCTION

4 This is an insurance coverage action arising from an underlying lawsuit in British  
5 Columbia, Canada. Northwest Pipe Company, (hereinafter “Northwest Pipe”) (an Oregon  
6 corporation), was sued by the Greater Vancouver Water District (hereinafter “GVWD”) for  
7 claims relating to the Seymour-Capilano Filtration Project (hereinafter the “Project”) that  
8 Northwest Pipe was involved with in British Columbia (hereinafter “Canadian lawsuit”).

9 Northwest Pipe entered into a supply contract with the GVWD on September 20, 2006 for  
10 the manufacture and supply of steel liner and grout plugs for the Project. In the underlying  
11 litigation the GVWD alleges that there were defects with the steel liner and grout plugs used in  
12 the Project.

13 More than a year after the lawsuit was filed against Northwest Pipe, it tendered a claim for  
14 defense and indemnity coverage under its general liability policy issued by Travelers in  
15 Washington. Travelers promptly agreed to defend Northwest Pipe subject to a Reservation of  
16 Rights letter (“ROR”). The ROR letter was issued to Northwest Pipe on October 26, 2016. In the  
17 letter, Travelers agreed to retain Northwest Pipe’s selected Canadian defense counsel, Don  
18 Smith and the SHK law firm. Travelers promptly paid all fees and costs associated with the  
19 defense of the underlying Canadian lawsuit through Northwest Pipe’s selected counsel.

20 In addition to the defense being provided by the SHK law firm, Northwest Pipe also  
21 voluntarily retained Sam Sandmire and the Ater Wynne law firm, their local Oregon corporate  
22 counsel, to assist Northwest Pipe. Travelers initially stated in its ROR that fees for the services  
23 of Mr. Sandmire would not be paid for by Travelers. Northwest Pipe did not respond to

Travelers' ROR letter to challenge that position or to provide any further information to Travelers regarding the services of Mr. Sandmire. Travelers did not receive any invoices for its review from Mr. Sandmire for payment until after Travelers had filed its Declaratory Judgment Action. Once Travelers received the Ater Wynne bills and despite Travelers' concerns regarding the billing entries, and as a matter of good faith, Travelers has paid the Ater Wynne bills in full.

Travelers filed a Complaint for Declaratory Judgment on February 8, 2017 to obtain a ruling from the Court on the coverage issues involved with the claim. Seven months after Travelers agreed to defend Northwest Pipe and three months after Travelers filed its Declaratory Judgment Action, Northwest Pipe asserted, for the first time, extra-contractual claims against Travelers. Northwest Pipe is asserting bad faith claims based on the following:

1. Travelers' alleged wrongful denial of payment for fees and costs submitted by Northwest Pipe for its corporate counsel without a reasonable investigation;
2. Violation of Travelers' enhanced obligation of fairness towards its insured;
3. Travelers' alleged unreasonable delay in investigating coverage and in agreeing to defend Northwest Pipe.

Dkt. 48.

The evidence presented at trial will show that Northwest Pipe cannot meet its burden of proof as to the elements of each of the causes of action asserted in this matter. Northwest Pipe will not be able to establish the necessary elements of its bad faith claims. Specifically, Northwest Pipe will not be able to establish that Travelers denied Northwest Pipe's claim for defense costs and expenses.

Northwest Pipe will argue that Travelers breached the policy and failed to conduct a reasonable investigation of the claim, including an unreasonable delay in issuing the ROR letter.

1 Northwest Pipe will further argue that Travelers failed to investigate Travelers' claim  
2 for defense fees and the interest on those fees from the Ater Wynne law firm.

3 Northwest Pipe's argument, though, ignores the actual evidence that will be presented at  
4 trial. Specifically, the evidence will establish that Travelers timely investigated the claim made  
5 by Northwest Pipe, and timely agreed to pay the fees of Northwest Pipe's chosen defense  
6 counsel. Further, the evidence will establish that despite not being required to pay the Ater  
7 Wynne legal fees, Travelers paid the fees in full and attempted to pay the full interest for those  
8 fees. Further, the evidence will establish that Travelers has paid the fees in full for Northwest  
9 Pipe's choice of Canadian counsel to represent them in the Canadian lawsuit.

10 Northwest Pipe's extra-contractual claims are unsupported by the evidence. The  
11 evidence will establish that Travelers' conduct in the handling of Northwest Pipe's claim was  
12 reasonable at all times. Travelers personnel will testify to the extraordinary lengths to which  
13 they went in order to provide service to Northwest Pipe in dealing with the claim presented,  
14 which included complex coverage issues. That testimony will be supported by claims handling  
15 expert William Hight. Travelers' reasonable approach to Northwest Pipe's claim and its  
16 ongoing efforts to ensure that Northwest Pipe received all benefits to which it was entitled  
17 under the Travelers policy of insurance, are a complete defense to each of Northwest Pipe's  
18 extra-contractual claims.

19 Moreover, as is discussed below in some detail, the evidence does not support the  
20 discreet elements of each extra-contractual claim for bad faith, and violation of the CPA. The  
21 failure of proof on the elements of each of the causes of action is similarly fatal to Northwest  
22 Pipe's claims.

23 At trial, Travelers will present evidence establishing the following facts:

- 1 • The underlying suit was filed against Northwest Pipe in British Columbia,  
2 Canada on August 7, 2015. Dkt. 18.12.
- 3 • Northwest Pipe was served with the Amended Notice of Civil Claim against it  
4 on July 27, 2016. Dkt. 18.12. Northwest Pipe then tendered the claim to  
5 Travelers on July 28, 2016. Dkt. 107.
- 6 • The file was officially set up by Travelers on August 5, 2016 and assigned to  
7 Dana Falstad. *Id.* Also on August 5, a Canadian defense file was set up to  
8 address the specific defense issues with respect to the Canada lawsuit.
- 9 • On August 9, 2016, Travelers acknowledged receipt of the claim and began  
10 investigating the claim. Dkt. 107.2.
- 11 • Travelers never denied coverage to Northwest Pipe.
- 12 • On August 11, 2016, during Travelers' initial investigation of the claim, Ms.  
13 Falstad asked Northwest Pipe whether a response to the Canadian Complaint  
14 had been filed. Dkt. 107. At this point, Travelers was informed that Northwest  
15 Pipe had hired Canadian Attorney Don Smith to represent them in the Canadian  
16 action. Northwest Pipe also informed Travelers that it had retained Oregon  
17 counsel, Sam Sandmire, of the firm Ater Wynne. *Id.*
- 18 • Travelers reviewed the operative pleadings to determine whether there was a  
19 duty to defend. Travelers also reviewed multiple policies which were potentially  
20 applicable to this claim.
- 21 • Travelers based its review upon the underlying Notice of Civil Claim, which is  
22 different from a normal Washington Complaint. Moreover, the potential  
23 coverage issues presented in the claim were complicated and involved a number

1 of potential coverage issues. Issues addressed included whether there was  
2 resulting third party property damage, whether there was a covered occurrence,  
3 whether Your Product or Your Work Exclusion applied, whether the Recall  
4 Exclusion applied, whether the Contractual Liability Exclusion applied, whether  
5 the Impaired Property Exclusion applied, potential late tender issues, which  
6 policies were potentially triggered, etc. Travelers was also obtaining information  
7 regarding any excess or umbrella coverages potentially triggered and the  
8 exposures and liabilities in the Canadian action.

- 9 • On September 19, 2016, Travelers retained Lether & Associates to provide legal  
10 advice on the duty to defend issue and to assist in drafting the Reservation of  
11 Rights letter. Dkt. 107.
  - 12 • On September 26, 2016, Travelers made the initial determination that the  
13 underlying complaint triggered a duty to defend. *Id.*
  - 14 • On October 14, 2016, Lether & Associates provided a proposed Reservation of  
15 Rights letter to Travelers. Dkt. 104. Travelers thoroughly reviewed this letter  
16 and on October 26, 2016, Travelers issued its Reservation of Rights letter to  
17 Northwest Pipe. *Id.*
  - 18 • The Reservations of Rights letter expressly invited Northwest Pipe to provide  
19 any information that it may have had that had any bearing on the issues  
20 addressed in the letter. *Id.*
  - 21 • Northwest Pipe did not respond to any of the questions posed by Travelers in the  
22 Reservation of Rights letter. Dkt. 107.
- 23

- 1           • Travelers filed this Declaratory Relief Action on February 8, 2017 to address a  
2           number of coverage issues. Dkt. 1.
- 3           • On March 24, 2017, Northwest Pipe filed an answer to Travelers' Complaint for  
4           Declaratory Relief and asserted a Counterclaim for Declaratory Judgment in its  
5           favor on the issue of coverage. Dkt. 13.
- 6           • Northwest Pipe did not raise coverage by estoppel as a remedy in its Answer and  
7           Counterclaims, nor did it assert any extra-contractual claims. *Id.*
- 8           • A series of Motions including Cross-Motions for Summary Judgment on the  
9           issue of coverage were then filed. Dkt. 14 & Dkt. 17.
- 10          • Northwest Pipe did not raise the coverage by estoppel argument in its Motion  
11          for Summary Judgment on the issue of coverage in response to Travelers' Cross-  
12          Motion for Summary Judgment. *Id.*
- 13          • On July 20, 2017 the Court granted in part Travelers' Motion for Summary  
14          Judgment in regard to coverage and found that there was no coverage for nearly  
15          every aspect of the claims asserted against Northwest Pipe in the Canadian  
16          lawsuit. The Court found that the Impaired Property Exclusion expressly applied  
17          and precluded coverage for anything other than potential third-party property  
18          damage involving the pipeline welds. Dkt. 47.
- 19          • On March 1, 2018, Travelers issued its first set of discovery to Northwest Pipe  
20          on the extra-contractual issues. Dkt. 106.1.
- 21          • Northwest Pipe refused to respond until a Protective Order was in place. Dkt.  
22          106.2

- 1           • After multiple discovery conferences and supplements to Travelers' privilege  
2           log and production, Travelers renewed its request for Northwest Pipe's  
3           responses in a letter sent to Northwest Pipe on May 15, 2018. Dkt. 106.3.
- 4           • Travelers further reiterated its request in a letter dated August 14, 2018.  
5           Dkt.106.4.
- 6           • On August 31, 2018, Travelers finally received Northwest Pipe's discovery  
7           responses. Dkt. 106.5.
- 8           • In the responses, the only allegations involving bad faith are the alleged delay in  
9           regard to the ROR letter and issue of the payment of the Ater Wynne bills. *Id.*
- 10          • The only claimed damages are interest on the Ater Wynne legal fees and the fees  
11          that Northwest Pipe has paid its claims handling expert. *Id.*, pp. 11-12.
- 12          • Travelers conducted the 30(b)(6) deposition of Northwest Pipe on October 5,  
13          2018.
- 14          • In that deposition the 30(b)(6) deponent of Northwest Pipe confirmed the only  
15          claims against Travelers arose from alleged delay in issuing the Reservation of  
16          Rights and Travelers' initial position on the Ater Wynne bills. Dkt. 106.7.
- 17          • In regard to any damages, Northwest Pipe's 30(b)(6) deponent confirmed the  
18          only damages were for interest for the Ater Wynne bills and Northwest Pipe's  
19          litigation costs. *Id.* In regard to the interest calculation, the Northwest Pipe  
20          30(b)(6) deponent confirmed the interest amount was \$5,196.33. *Id.*
- 21          • Northwest Pipe's (30)(b)(6) deponent confirmed there is no other basis for a CPA  
22          claim. *Id.*



## II. FACTUAL ANALYSIS

It is anticipated that Northwest Pipe will argue that Travelers improperly handled its initial investigation of the claims file. The evidence presented at trial will show that Travelers acted reasonably in all aspects of the claim handling process. Northwest Pipe will argue that Travelers failed to conduct a reasonable investigation thus violating the Consumer Protection Act and the Washington Administrative Code. However, there is no evidence to support the claim that Travelers' investigation was unreasonable. As Northwest Pipe's own bad faith expert testified, there were thousands of documents that came in pursuant to Travelers' request for job file documentation and contracts. Dkt. 106.8. Further, as the facts on the record establish, Travelers investigated several aspects of the claim and came to a determination on the duty to defend issue within 41 business days of the initial tender.

Finally, Northwest Pipe will argue that Travelers failed to timely pay the Ater Wynne legal bills. However, Northwest Pipe never advised Travelers that Ater Wynne was actively defending Northwest Pipe. Further, Northwest Pipe never asked Travelers for reimbursement of the Ater Wynne bills and never made a claim for reimbursement based upon the supplementary payment policy provision. Dkt. 107.

The first time that Northwest Pipe asked for Travelers to pay for the Ater Wynne legal bills was when Northwest Pipe filed their Motion for Leave to Amend its Answer and Counterclaim. The motion and proposed pleading were filed on May 4, 2017. Dkt. 26. By email on July 21, 2017, Northwest Pipe offered to provide the Ater Wynne legal bills as, "part of an ER 408 settlement offer." Dkt. 107.8. Following this Court granting its motion, Northwest Pipe filed its Amended Answer and Counterclaims on July 24, 2017. (Dkt at 48). (Dkt at 48, pgs. 10-11). In response to the ER 408 email and amended counterclaim, on July 27, 2017, Travelers

1 wrote to Northwest Pipe in regard to the Ater Wynne issue and asked for copies of the legal bills  
2 for review. Dkt. 107.9.

3 There was no response from Northwest Pipe. As a result, in a letter dated August 17,  
4 2017, Travelers once again asked for the legal bills. Dkt. 107.10. By letter of August 21, 2017,  
5 Northwest Pipe finally responded to Travelers' requests, indicating that it would not provide  
6 copies of the Ater Wynne bills unless a protective order were entered. Dkt. 107.11

7 During that time, the legal bills from defense counsel in the Canadian lawsuit were being  
8 submitted to Travelers' claims personnel on a monthly basis without a protective order in place.  
9 Once again, these bills were being processed and paid timely by Travelers. Dkt. 107.

10 This need for a protective order was solely at the request of Northwest Pipe. Dkt. 106.7.  
11 Thereafter, Travelers and Northwest Pipe negotiated the terms of the Stipulated Protective  
12 Order. The order was entered by the Court on December 12, 2017. Dkt. 63. On December 18,  
13 2017, Northwest Pipe finally forwarded copies of the Ater Wynne legal bills. These bills were  
14 received on December 20, 2017. Dkt. 107.12.

15 Travelers will establish that it thoroughly reviewed the Ater Wynne bills once they were  
16 provided by Northwest Pipe and, despite significant concerns, Travelers agreed to pay the bills  
17 in their entirety. This agreement was set forth in Travelers' letter of January 11, 2018. Dkt.  
18 107.13. The payment of the Ater Wynne bills was thereafter issued by Travelers on January 29,  
19 2018. Dkt. 107.14. As set forth below, Travelers has subsequently attempted to pay for the full  
20 interest claimed by Northwest Pipe on these fees. Dkt. 107.15.

21 Travelers will establish that it timely and reasonably investigated the claim from  
22 Northwest Pipe. Travelers will further establish that it timely paid the Ater Wynne legal bills  
23 and that any delay was the result of Northwest Pipe. Finally, Travelers will establish that it did

not violate the Consumer Protection Act. Accordingly, Travelers will establish that coverage by estoppel is not an available remedy to Northwest Pipe on the facts of this case.

### III. ISSUES FOR TRIAL

#### A. Statement of Issues

This matter proceeds to trial on the following issues:

- Whether Travelers is liable to Northwest Pipe for breaching its duty of good faith?
- Whether Travelers actions violated the Washington Consumer Protection Act?
- Whether Coverage by Estoppel is an available remedy for Northwest Pipe?

### IV. ANALYSIS OF ISSUES

#### A. Northwest Pipe Cannot Prove that Travelers Committed Bad Faith.

A claim for insurance bad faith under Washington law is recognized as a tort. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499, 503 (1992). An essential element of any tort claim is that the alleged wrongful act caused harm. *Christensen v. Swedish Hosp.*, 59 Wn.2d 545, 548, 368 P.2d 897 (1962). Therefore, harm is an essential element of an action for bad faith handling of an insurance claim. *Cf. Burnham v. Commercial Cas. Ins. Co.*, 10 Wn.2d 624, 627, 117 P.2d 644 (1941). In order for a party to present a claim for bad faith, the party must establish all of the following essential elements:

- 1) The existence of a duty;
- 2) breach of that duty; and
- 3) damages that were proximately caused by the breach of that duty.

The insured has the burden of proof as to each of these elements. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 165 Wn.2d 122, 130, 196 P.3d 664 (2008). In order to establish a claim for insurance bad faith, an insured must be found to have acted in an *unreasonable, frivolous, or unfounded manner*. *St. Paul Fire & Marine Ins. Co. supra*. (Emphasis added). As long as the

insurer has a reasonable basis for its claim's decision, there is no bad faith. *Dombrosky v. FIE Ins. Co.*, 84 Wn. App. 245, 982 P.2d 1127; *Miller v. Indiana Ins. Co.*, 31 Wn. App. 475, 479, 642 P.2d 769 (1982); *Transcontinental Ins. Co. v. Washington Public Utilities District*, 111 Wn.2d 452, 470, 760 P.2d 337 (1988). *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499, 503 (1992).

An insurer that has a reasonable basis for withholding payment under a policy cannot be said, as a matter of law, to be acting in bad faith. Washington Courts have stated the following:

Bad faith requires a showing of frivolous and unfounded denial of benefits. Indiana denied coverage based on a reasonable interpretation of the policy; this was not bad faith as a matter of law...The mere denial of benefits due to a debatable question of coverage is insufficient.

*Miller v. Indiana Ins. Co.*, at 479. Further, the Court of Appeals has held as follows:

Our courts have rejected attempts to base bad faith and CPA claims on legal arguments when, as here, there is no showing of bad faith, there is a debatable question regarding coverage for the loss, and the denial of coverage is based on a reasonable interpretation of the insurance policy.

*Capelouto v. Valley Forge Ins. Co.*, 98 Wn. App. 7, 22, 990 P.2d 414 (1999) (internal citations omitted).

In addressing reasonableness in the context of unfair claims provisions under the WAC's, the *Keller* Court stated:

For the above reasons, we agree with the *Starczewski* court that "an incorrect denial of coverage does not constitute an unfair trade practice if the insurer had 'reasonable justification' for denying coverage."

*Keller v. Allstate Insurance Co.*, 81 Wn. App. 624, 634 (1996) (internal cites omitted).

Northwest Pipe will argue that Travelers has acted in an unreasonable, frivolous or unfounded manner in this case. However, the evidence will not support Plaintiff's allegations. Northwest Pipe will further argue that Travelers acted in bad faith by failing to disclose pertinent policy benefits.

1 It is well established by Washington Courts that whether an insurers' conduct is  
2 unreasonable can be determined as a matter of law. In *Cardenas v. Navigators Ins. Co.*,  
3 Navigators issued a liability policy. *Cardenas v. Navigators Ins. Co.*, 2011 U.S. Dist. LEXIS  
4 145194 (W.D. Wash. 2011).

5 In *Cardenas*, the insured alleged that Navigators failed to timely investigate and was  
6 liable for delay in defending Cardenas. *Id* at 14. Cardenas claimed that the claim was tendered  
7 to Navigators on February 23, 2010, and that Navigators did not respond with its ROR letter  
8 till May 18, 2011. However, Navigators acknowledged the claim within four days of tender.  
9 The ROR was issued 208 days after the initial tender by Cardenas. The court found that as a  
10 matter of law that the amount of time it took Navigators to respond and issue the ROR letter  
11 was reasonable. The Court dismissed Cardenas' extra contractual claims for insurance bad  
12 faith and held:

13 Violations, if any, of the 10 and 30 day time periods for acknowledging a claim  
14 and completing an investigation, are simple technical violations and standing  
15 alone, do not evidence any unreasonable conduct on the part of Navigators  
promptly responding to the tender.

16 *Cardenas*, at 16.

17 Northwest Pipe will argue that Travelers violated WAC § 284-30-370. WAC § 284-30-  
18 370, which requires every insurer to complete an investigation within 30 days after notification  
19 of a claim, **unless such investigation cannot reasonably be completed within such time.**  
20 WAC § 284-30-370, (**emphasis added**). Travelers will be able to show through evidence  
21 presented at trial that it promptly acknowledged Northwest Pipe's claim and began  
22 investigating. The evidence presented will show that Northwest Pipe's claim involved  
23 complicated choice of law jurisdictional issues as well as complex coverage issues. In order to  
properly assess the claim, Travelers had to engage claims representatives in both Canada and

1 Washington. Further, the evidence at trial will show that Travelers had to review the actual  
2 notice of a claim and all applicable policies of insurance in order properly analyze its duty to  
3 defend.

4 Finally, Washington law requires a liability insurer to review extrinsic evidence in an  
5 effort to analyze its duty to defend. See *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53,  
6 164 P.3d 454, 459, (2007). The evidence presented at trial will show that in order to properly  
7 determine if there was a duty defend, Travelers had to review a large number of files which  
8 included the underlying contract, job file information, and other materials involving the  
9 Canadian lawsuit.

10 The evidence will establish that Travelers had to do much more than just review the  
11 policy and the notice of claim. Given the exposures in regard to the claim and its complexities,  
12 the claim decision had to be fully reviewed, discussed, and approved by management.  
13 Travelers will show that the investigation was a complicated process which reasonably took  
14 more than 30 days. Accordingly, Northwest Pipe cannot establish that Travelers acted in bad  
15 faith by any unreasonable delay of the claim's investigation or any unreasonable denial of the  
16 claim.

17 ***i. Travelers Did Not Act in Bad Faith by Failing to Disclose Pertinent Policy Benefits***

18 The evidence presented at Trial will show that Northwest Pipe used its Motion for  
19 Summary Judgment on Extra-Contractual claims as an opportunity to add new theories of  
20 liability that had not been previously asserted. This includes Northwest Pipe's claim that  
21 Travelers acted in bad faith by failing to disclose pertinent policy benefits to Northwest Pipe.  
22 Northwest Pipe's own 30(b)(6) deponent did not address this claim in his deposition testimony  
23 and this claim was never asserted prior to Northwest Pipe's filing of its Motion for Summary

1 Judgment on Extra Contractual Claims. Dkts. 106 & 106.7. Further, the evidence will show  
2 that this claim for relief was never raised by Northwest Pipe in its discovery responses nor was  
3 it brought up by Northwest Pipe's bad faith expert, Dennis Smith, in his reports or at his  
4 deposition.

5 Even if a claim for failure to disclose pertinent policy benefits had been timely asserted  
6 by Northwest Pipe, there was no failure to disclose by Travelers. There is no benefit under the  
7 Travelers policy issued to Northwest Pipe that would provide coverage for two law firms,  
8 which is essentially what Northwest Pipe is claiming was not disclosed to them by Travelers.  
9 There is no legal basis for Travelers to have paid for a second law firm to defend Northwest  
10 Pipe in the underlying lawsuit. As such, there was no failure to disclose a pertinent benefit by  
11 Travelers. Further, Travelers did not misrepresent or conceal any policy information.

12 Accordingly, the evidence will show that Northwest Pipe's claim that Travelers acted  
13 in bad faith by failing to disclose pertinent policy benefits is without merit.

14 ***ii. Travelers Did Not Deny Any Aspect of Northwest Pipe's Defense Cost***

15 It is undisputed that Travelers paid the full amount of the Ater Wynne legal bills to  
16 Northwest Pipe despite their concerns with the billing practices of Ater Wynne. The evidence  
17 will further show that Travelers attempted to pay the interest on those bills to Northwest Pipe.  
18 Accordingly, the evidence will show that Travelers did not deny any aspect of Northwest  
19 Pipe's defense cost expenses.

20 The evidence highlighted above shows that Northwest Pipe never made a claim for Ater  
21 Wynne fees until it filed its Amended Counterclaim. Further, Northwest Pipe initially informed  
22 Travelers that Don Smith and the SHK law firm was defending Northwest Pipe in the  
23 underlying action. Travelers will present evidence that will show that in response, Travelers

1 paid the full amount of all defense fees and costs incurred through Don Smith and the SHK  
2 firm timely as those bills were presented to Travelers for review and payment of the same.

3 The evidence will further show that Northwest Pipe never raised any issue in regard to the Ater  
4 Wynne bills. Northwest Pipe did not present the Ater Wynne bills to Travelers for payment as  
5 it did with the Don Smith and SHK bills. Northwest Pipe did not present Travelers with the  
6 Ater Wynne bills until December 20, 2017.

7 The evidence presented at trial will show that there is no requirement under the policy  
8 for Travelers to pay for the insured's personal counsel in addition to its defense counsel. The  
9 policy only requires Travelers to defend a "suit" – which is the Canadian lawsuit that Travelers  
10 is defending. The only other potential coverage that Northwest Pipe could have made a claim  
11 for is under the supplementary payments provision of the policy. This provision is not  
12 applicable here for two reasons. First, Travelers never requested Ater Wynne's assistance in  
13 the defense of the underlying action. Second, Northwest Pipe never submitted a supplemental  
14 payment claim to Travelers. Dkt. at 107. Further, the Policy states the following regarding  
15 supplementary payments:

16 No other obligation or liability to pay sums or perform acts or  
17 services is covered unless explicitly provided for under  
Supplementary Payments Coverages A and B.

18 Dkt. 107.1

19 Washington law expressly allows liability insurers to select counsel for the insured. *See*  
20 *Kruger-Willis v. Hoffenburg*, 198 Wn. App. 408, 416, 393 P.3d 844, 848, (2017) *citing*  
21 *Johnson v. Cont'l Cas. Co.*, 57 Wn. App. 359, 362-63, 788 P.2d 598 (1990). Some states, such  
22 as California, allow for independent counsel. However, that right is only allowed when there is  
23 a conflict of interest between the insured and insurer in the defense of the underlying law suit.



1 *James 3 Corp. v. Truck Ins. Exch.*, 91 Cal. App. 4th 1093, 1105-1106, 111 Cal. Rptr. 2d 181,  
2 189-190, 2001 Cal. App. LEXIS 669, \*23-24, 2001 Cal. Daily Op. Service 7398, 2001 Daily  
3 Journal DAR 9105; *Foremost Ins. Co. v. Wilks*, 206 Cal. App. 3d 251, 260, 253 Cal. Rptr. 596,  
4 601, 1988 Cal. App. LEXIS 1109, \*16-17.

5 As the insured, Northwest Pipe was obligated to provide information to defense counsel  
6 and Travelers. This information included records, job files, copies of policies, and other claim  
7 related materials. The information provided by Northwest Pipe shows that all Ater Wynne did  
8 was assist Northwest Pipe in complying with its obligations under the policy. Ater Wynne's  
9 tasks included placing a litigation hold on records, providing record information to Travelers  
10 and Don Smith, and vetting Mr. Smith as potential defense counsel. The evidence will further  
11 show that Ater Wynne never conducted any defense related activities in regard to defending  
12 Northwest Pipe. In fact, when asked about whether Ater Wynne filed any pleadings, conducted  
13 any discovery, attended any hearings or conducted any depositions, Northwest Pipe's 30(b)(6)  
14 deponent testified "[n]ot to my Knowledge." Dkt. 106.7, p.66, 21-25.

15 The evidence presented at trial will show that Don Smith was retained by Northwest  
16 Pipe almost immediately after the suit was served. Accordingly, there was no conceivable harm  
17 which could have occurred to Northwest Pipe during the period in which Travelers was  
18 reviewing coverage issues. The evidence will show that Northwest Pipe voluntarily retained its  
19 own coverage counsel. The evidence will further show that Northwest Pipe did not raise an  
20 issue on the Ater Wynne fees till it filed its Motion for Leave to Amend the Complaint in order  
21 to assert extra contractual claims.

22 Northwest Pipe argues that the Ater Wynne fees were addressed in the original  
23 Counterclaim and that Travelers denied coverage for those fees in its Answer. This claim is

1 false. That specific claim is not presented in the original Counterclaim. Moreover, an insurer  
2 has a right to take a position in a litigation forum without being exposed to a bad faith claim  
3 based upon that position. *Richardson v. Gov't Emps. Ins. Co.*, 200 Wn. App. 705, 719-720, 403  
4 P.3d 115, 124 (2017).

5 The evidence will show that following Travelers' request for the Ater Wynne bills,  
6 Northwest Pipe delayed 97 days before it actually provided those bills. 26 business days later,  
7 and despite concerns with the Ater Wynne billing, Travelers paid the full amount of defense  
8 costs. Northwest Pipe then requested interest on those bills, and after confirming the amount  
9 sought by Northwest Pipe with Northwest Pipe's 30(b)(6) representative, Travelers agreed to  
10 pay the interest as well.

11 The evidence will show that Travelers did not deny any aspect of Northwest Pipe's  
12 presented defense costs and that any delay in payment was the result of Northwest Pipe failing  
13 to timely submit the Ater Wynne bills to Travelers for review.

14 ***iii. Travelers' Investigation of the Claim was Timely***

15 The evidence presented at trial will show that Travelers conducted a thorough and  
16 prompt investigation of Northwest Pipe's claim for benefits. As stated above, Travelers  
17 promptly acknowledged the claim and began its investigation. The coverage aspects of  
18 Northwest Pipe's claim were highly complicated and required Travelers to engage claims  
19 representatives from multiple jurisdictions. WAC § 284-30-370 requires investigations to be  
20 completed within 30 days if the investigation can reasonably be completed during that time  
21 frame. The evidence will show that due to the complexity of the jurisdictional and coverage  
22 issues, it was reasonable for Travelers to take more than 30 days in its investigation. Northwest  
23 Pipe's own bad faith expert testified:

1 Q. Okay. And in the real world of providing coverage advise to insurance  
2 companies, getting a file, reviewing a file, giving a coverage opinion,  
writing up a coverage opinion, sometimes takes longer than 30 days?

3 A. It can take longer than 30 days.

4 Dkt. 106.7

5 Further, Northwest Pipe is claiming that Travelers failed to investigate Northwest Pipe's  
6 claim for payment of the Ater Wynne bills. However, the evidence will show that Northwest  
7 Pipe never actually presented a claim for the Ater Wynne bills to Travelers until it submitted its  
8 Amended Counterclaims. Dkt. 118.

9 It is well established by Washington Law that insurance companies have a duty to  
10 investigate claims that have been presented to the insurer. No insurer has an obligation to  
11 investigate claims which have not been presented to the insurer. The Washington Courts have  
12 held as follows:

13 However, "[a]n insurer cannot be expected to anticipate when or if  
14 an insured will make a claim for coverage; the insured must  
affirmatively inform the insurer that its participation is desired.

15 *Mut. Of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 420 (2008). See also  
*Unigard Ins. Co. v. Leven*, 97 Wn. App. 417 (1999.)

16 Northwest Pipe will argue that its August 11, 2016 email establishes a claim for its Ater  
17 Wynne bills. Dkt.107.3. However, all this email does is state that Northwest Pipe had hired two  
18 firms. At no point does that email ask Travelers for a reimbursement of fees or costs or for  
19 Travelers to begin an investigation. There were no Ater Wynne bills submitted to Travelers for  
20 processing until December 20, 2017.

21 The evidence at trial will clearly show that given the exposures in the claim and the  
22 complex nature of the underlying claim, it was more than reasonable for Travelers to take more  
23 than 30 days in concluding its investigation process. Further, the evidence will show that

1 Northwest Pipe did not make a claim for reimbursement of its Ater Wynne legal fees until its  
2 Amended Counterclaims were filed. Once that claim was presented, Travelers paid the legal  
3 fees. Accordingly, the evidence will show that Travelers' investigation of the claim was timely.

4 ***iii. Northwest Pipe Cannot Establish Any Evidence of Damages or Proximate Cause***

5 The evidence presented at trial by Northwest Pipe will not be sufficient to establish  
6 proximate cause and actual damages. In order to establish a cause of action sounding in the tort  
7 of bad faith, Northwest Pipe is required to establish that they suffered ***actual damage***  
8 proximately caused by the alleged unreasonable, frivolous or unfounded acts. *See Overton v.*  
9 *Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322, 329, 2002 Wash. LEXIS 53, \*23, 32 ELR  
10 20476.

11 Travelers will show that Northwest Pipe has not presented any evidence supporting that  
12 it was harmed by the acts or omissions of Travelers. The only evidence provided by Northwest  
13 Pipe in support of its extra-contractual damages' claims are general, conclusory statements  
14 offered in response to Travelers' letters and discovery requests.

15 Further, the only evidence provided by Northwest Pipe potentially relating to any injury  
16 or harm is its claim for \$5,196.33 in interest and the cost of its expert in the amount of \$5,800.  
17 The evidence will show that Travelers has attempted to pay the interest to Northwest Pipe and  
18 that the payment was rejected by Northwest Pipe. The only reason Northwest Pipe rejected that  
19 payment is to somehow claim that it is still harmed. The payment of the interest was not  
20 conditioned on any release or waiver of Northwest Pipe's claims. See Dkt. 107.15.

21 Northwest Pipe is now bringing a claim to recover the fees of its bad faith expert,  
22 Dennis Smith. Dennis Smith is purely a litigation expert. These fees were generated long after  
23 the litigation was first filed. Fees and costs incurred pursuing extra-contractual claims are not

1 actual damages under those legal theories. *Schreib v. Am. Family Mut. Ins. Co.*, 129 F. Supp.  
2 3d 1129, 2015 U.S. Dist. LEXIS 118189; *Sign-O-Lite Signs v. DeLaurenti Florists*, 64 Wn.  
3 App. 553, 825 P.2d 714 (1992).

4 Travelers will show that Dennis Smith provided two opinions in this case. Dkt. 114.  
5 The first addresses the Ater Wynne bills issue. Those bills were paid by Travelers on January  
6 29, 2018, prior to any billing entries by Dennis Smith regarding this issue. Dkt. 122. As a  
7 result, the Ater Wynne legal fees were no longer at issue when Dennis Smith began reviewing  
8 it. Therefore, Dennis Smith's fees for his review of the Ater Wynne fee issue are unreasonable.

9 Mr. Smith further provided an opinion regarding Travelers' alleged improper file  
10 sharing and file splitting. This was a speculative issue based completely on assumptions made  
11 by Northwest Pipe. Dkt. 122. Mr. Smith even admitted in deposition that the theory involving  
12 this inappropriate sharing of information was highly speculative. Dkt. 117.3. As a result,  
13 Northwest Pipe has since dismissed this claim. Dkt. 101. As a result, this claim was an  
14 unsuccessful claim and Mr. Smith's fees to review the file splitting issue are unreasonable.

15 The evidence that Travelers will present at trial will show that Mr. Smith's fees were  
16 not incurred to investigate the claim or establish coverage. Regardless, Northwest has claimed  
17 damage for all of Mr. Dennis Smith's fees even though those fees include his reports and  
18 testimony on dismissed or moot issues. Any fees associated with unsuccessful claims are not  
19 recoverable. See, *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, (2007).

20 The evidence presented at trial will show that Travelers paid the Ater Wynne legal fees  
21 and attempted to pay the interest on those fees. Beyond those fees, Northwest Pipe has not  
22 presented evidence for any other actual damages to Travelers. Accordingly, Northwest Pipe  
23 will not be able to establish any evidence of damages.

1 **B. Coverage by Estoppel is not an Available Remedy to Northwest Pipe in this**  
 2 **Matter.**

3 Coverage by estoppel is not a separate cause of action but is rather a tort remedy  
 4 developed by the Washington State Supreme Court for certain, limited instances of bad faith  
 5 regarding the duty to defend in the context of third-party liability claims. *Coventry v.*  
 6 *American States Ins. Co.*, 136 Wn.2d 269, 285, 961 P.2d 933, 940, (1998); *Onvia, Inc.* at 129.  
 7 In fact, in most instances involving insurance disputes, the Courts have applied the traditional  
 8 rules of estoppel. This includes proving by clear, cogent, and convincing evidence an  
 9 inconsistent act and reasonable reliance by the party seeking estoppel. *Dombrosky v. Farmers*  
 10 *Insurance Company of Washington*, 84 Wn. App. 245, 928 P.2d 1127 (1996). The Courts in  
 11 Washington have only adopted coverage by estoppel in certain extreme cases of bad faith.  
 12 Northwest Pipe cannot present evidence that would show that Travelers acted in extreme bad  
 13 faith. This issue is controlled by *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150  
 14 Wn. App. 1 (2009).

15 The evidence presented at trial will establish that Travelers never denied the duty to  
 16 defend nor did it ever leave Northwest Pipe without a defense. The evidence will further show  
 17 that Travelers acted in the precise way required by the Washington State Supreme Court.  
 18 Specifically, Travelers defended under a ROR and brought a Declaratory Judgment action to  
 19 determine coverage.

20 The Washington State Supreme Court has held that defending under an ROR is the precise  
 21 manner in which an insurer can avoid exposure to coverage by estoppel. The courts have stated  
 22 as follows:

23 . . . defending under a reservation of rights enables the insurer to  
 protect its interests without facing claims of waiver or estoppel and

1 to walk away from the defense once a court declares it owes no  
2 duty.

3 By insuring itself against potentially disastrous findings of breach,  
4 bad faith, waiver, and coverage by estoppel, an insurer  
5 unquestionably benefits from its decision to defend under a  
6 reservation of rights—even when, as here, a court later finds that it  
7 owes no duty to continue that defense.

8 *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 879-880, 297 P.3d 688, 691 (2013).

9 Travelers will show that Northwest Pipe's allegation regarding coverage by estoppel is  
10 based upon nothing more than a mere alleged technical violation. Northwest Pipe claims that  
11 Travelers failed to timely investigate and pay certain fees incurred by Northwest Pipe. As stated  
12 above, the fees incurred by Northwest Pipe have been paid and the interest on those fees was  
13 paid as soon as that claim was made. The only claim that Northwest Pipe has alleged is the delay  
14 before the Reservation of Rights was issued, which as stated above, was not an unreasonable  
15 delay. The evidence presented at trial will show that Washington Courts have never extended  
16 the coverage by estoppel remedy to this type of case. The Court in *Mutual of Enumclaw Ins. Co.*  
17 *v. Myong Suk Day* held that coverage by estoppel was not appropriate when the insurer did not  
18 fail to defend or defended under a reservation of rights. *Mut. of Enumclaw Ins. Co. v. Myong*  
19 *Suk Day*, 197 Wn. App. 753, 764, 393 P.3d 786, 792 (2017).

20 Washington Courts have further held that in cases where there is not any bad faith breach  
21 of the duty to defend, the party asserting the tort of bad faith must prove actual damages  
22 proximately caused by the alleged bad faith conduct. *St. Paul Fire & Marine Ins. Co. v. Onvia,*  
23 *Inc.*, 165 Wn.2d 122, 130, 196 P.3d 664, 668 (2008).

... [T]he facts of this case do not present a situation substantially  
different from that in *Coventry*, where the focus of the bad faith  
claim was on acts that arose immediately following the claim  
tender. *Coventry*, 136 Wn.2d at 274. As in *Coventry*, a reservation  
of rights or failure to defend in any capacity is not at issue.

1 Therefore, no rebuttable presumption of harm can arise here, and  
2 the measure of damages offered in *Coventry* should apply here  
3 also. The remedy of coverage by estoppel is not recognized in this  
4 context. . . As in *Coventry*, RMS must prove actual harm, and its  
5 “damages are limited to the amounts it has incurred as a result of  
6 the bad faith . . . as well as general tort damages.”

7 *Onvia, Inc.* at 133 (*emphasis added*).

8 Northwest Pipe is alleging that they are entitled to coverage by estoppel based on a delay  
9 following the tender of the claim and untimely payments of defense fees. As in *Coventry* and  
10 *Onvia*, the Court should conclude that coverage by estoppel is not an available remedy and that  
11 Northwest Pipe must prove actual damages and proximate cause.

12 Travelers will show that all consequential damages claimed by Northwest Pipe have  
13 been paid. Further, no other jurisdiction in the United States allows for coverage by estoppel  
14 when there is a reasonable delay or a technical violation of a regulatory provision. In the limited  
15 number of States where coverage by estoppel applies, it only applies when there is an actual  
16 denial of a defense resulting in there being no defense afforded to the insured.

17 Finally, Travelers will show that the Court has previously considered Northwest Pipe’s  
18 and Travelers’ Motions for Summary Judgment regarding coverage. Dkt. 47. Northwest Pipe did  
19 not raise the estoppel theory in its motion or in its response to Travelers’ motion. Northwest  
20 Pipe waived any estoppel claim by not asserting it in its original Counterclaim and not  
21 addressing it in response to the Motions on coverage. A waiver is a voluntary relinquishment of  
22 a known right or conduct from which relinquishment can be inferred. *Dombrosky v. FIE Ins.*  
23 *Co.*, 84 Wn. App. 245, 255 (1996). The alleged bad faith conduct in this case was admittedly  
known to Northwest Pipe before the counterclaim was filed and the coverage issues were  
litigated. Northwest Pipe relinquished its rights to make those claims when it did not assert them  
in its original pleading. Northwest Pipe is now trying to turn the uncovered portions of its



1 potential liability in the underlying lawsuit into covered claims on the basis that Travelers did  
 2 not act quickly enough in responding to the claim or that Travelers did not agree to pay the legal  
 3 bills generated by Ater Wynne. Travelers will show that if any party should be estopped, it is  
 4 Northwest Pipe. If Northwest Pipe believed that estoppel was available, it should have raised it  
 5 in its previous coverage motions. The evidence presented by Travelers at trial will bar  
 6 Northwest Pipe from bringing a claim for a coverage by estoppel remedy in this case.

7 **C. Northwest Pipe Cannot Support a Claim Under the Consumer Protection**  
 8 **Act**

9 In order to prevail on a claim for violation of Washington's CPA, a plaintiff bears the  
 10 burden of proving five (5) elements: (1) An unfair or deceptive act or practice; (2) Occurring in  
 11 trade or commerce; (3) That impacts the public interest; (4) Injury to his business or property;  
 12 and (5) That the injury was proximately caused by the unfair or deceptive act. *Hangman Ridge*  
 13 *Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531, (1986). The  
 14 Washington Supreme Court has ruled that in order for an insured to prevail on a CPA claim, the  
 15 insured must establish each of the five elements of the Hangman Ridge test listed above. *See*  
 16 *Industrial Indem. Co. v. Kallevig*, 114 Wn.2d 907, 923, 792 P.2d 520 (1990). The question of  
 17 whether an act or practice is actionable under the CPA is a question of law. *Dombrosky v.*  
 18 *Farmers Ins. Co.*, 84 Wn. App. 245, 260, 928 P.2d 1127, review denied, 131 Wn.2d 1018, 936  
 19 P.2d 417 (1997). An insured may establish a *per se* unfair trade practice under the CPA by  
 20 demonstrating a violation of RCW 48.30.010 based upon a violation of WAC 28430-330.  
 21 *Dombrosky*, 84 Wn. App. At 260, 928 P.2d 1127. However, even if there is a technical violation  
 22 of a WAC provision, the Washington Courts have held that reasonableness is a complete  
 23 defense to a CPA claim. *Keller v. Allstate Ins. Co.*, 81 Wn. App. 624, 634, 915 P.2d 1140  
 (1996).

1 Travelers will present evidence that it was reasonable at all times in the handling of the  
2 claim presented by Northwest Pipe. Northwest Pipe will not be able to show that Travelers  
3 engaged in any unfair or deceptive acts or practices. Travelers advised Northwest Pipe of its  
4 coverage decision within 47 business days from the date of tender. If Northwest Pipe was not  
5 advised by its lawyer of this decision, Travelers has no responsibility delay caused by its  
6 counsel. Even if the Court considers the first notice of the decision was in the Reservation of  
7 Rights letter, the time period between the date of tender and the Reservation of Rights letter  
8 was just 62 business days. This timeline is considerably shorter than the timeline considered in  
9 the *Cardenas* case wherein the Court found a period of over three months was reasonable.  
10 Northwest Pipe relies on *Weinstein v. Westport*, however the timeline in this case is shorter  
11 than the timeline set forth in *Weinstein*. Again, the Court found that to be a reasonable time  
12 period as a matter of law.

13 Further, based on the evidence that will be presented at trial, Northwest Pipe will not be  
14 able to establish any injury to business or property which will bar recovery under the CPA.  
15 *Hangman Ridge Training Stables v. Safeco Title Insurance Co.*, 105 Wn.2d 778, 719 P.2d 531  
16 (1986); *Sign-O-Lite Signs v. DeLaurenti Florists*, 64 Wn. App. 553, 825 P.2d 714 (1992).

17 As set forth above, the only damages that Northwest Pipe will be able to establish are the  
18 interest on its Ater Wynne fees and its costs for its bad faith expert. However, the evidence will  
19 clearly show that Travelers attempted to pay the full amount of interest and that Northwest Pipe  
20 rejected that payment. Further, Washington Courts have held that litigation costs such as expert  
21 costs are not in themselves damages or injury to actual business or property. *See, Sign-O-Lite*  
22 *Signs v. DeLaurenti Florists*, 64 Wn. App. 553, 825 P.2d 714 (1992). In addition, the evidence  
23 will show the claimed expert fees to be unreasonable as they are for unsuccessful or moot

1 claims. The evidence presented by Travelers at trial will prevent Northwest Pipe from bringing a  
2 viable claim under the consumer protection act.

3 **IV. CONCLUSION**

4 Based on the foregoing, Travelers will ask the Court to dismiss this matter at the close  
5 of Plaintiff's case in chief. To the extent that Travelers is required to put on a defense case,  
6 Travelers will ask the Court to instruct the jury in accordance with the law discussed herein  
7 and will ask the jury to enter a verdict in favor of Travelers.

8 DATED this 2<sup>nd</sup> day of January, 2019.

9 LETHER & ASSOCIATES, PLLC

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

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Dated this 2<sup>nd</sup> day of January, 2019, at Seattle, Washington.

/s/ Elizabeth Kruh  
Elizabeth Kruh | Paralegal